

THE VALUE AND EFFECT OF TRANSPARENCY IN GLOBAL LAW AND PUBLIC ADMINISTRATION

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SUMMARY

The article deals with the problem of the human right to information and transparency in public administration. Several approaches to transparency are applied in the article. Transparency is seen as a promoting concept of democratic reforms in public administration in Central and Eastern Europe. The author analyzed basic declarations of the Council of Europe Convention on Access to Official Documents. Besides, the cases, taken to the European Court of Human Rights, are researched.

Key words: *convent, globalization, government, information, public administration, right to information, transparency*

In modern conditions of globalization, transparency has a democratic instrumental value for political and legal science. Nowadays, the maxim of transparency is seen as a global norm and an effective tool both on international, and governmental domestic level. In this sense, transparency is often understood as a concept, an idea, a principle or a policy, that helps to solve governmental problems and promotes building of civil society.

The main functions of transparency are defined in the Council of Europe Convention on Access to Official Documents (No 205, 2009), that lays down a right of access to official documents. [1] The Convention is the first binding international legal instrument that provides recognition of a general right of access to official documents held by public authorities.

In this Convention transparency of public authorities is seen as ‘a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist. It is also essential to the self-development of people and to the exercise of fundamental human rights. Limitations on this right are only permitted in order to protect certain interests like national security, defense or privacy. The right of access to

official documents also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them. The Convention sets forth the minimum standards to be applied in the processing of requests for access to official documents (forms of and charges for access to official documents), review procedure and complementary measures and it has the flexibility required to allow national laws to build on this foundation and provide even greater access to official documents.'

At the present moment this Convention is not in force, as its entry into force depends on 10 ratifications by non-member/member states of the Council of Europe. Notably, in its Resolution 1954 (2013) 2 October 2013 the Parliamentary Assembly calls on all the member States of the Council of Europe which have not yet done so to sign and ratify the Council of Europe Convention on Access to Official Documents. [2]

The Convention is signed but not ratified by 14 member states.

For example, Moldova signed the Convention on 21 December 2010. [3] The Parliament of Moldova has ratified the Council of Europe Convention on the access to official documents on 31 October 2013. [4]

The importance of the Convention is seen in the fact that '...constitutions, national laws and jurisprudence across Europe now recognize a right of access to official documents...and this right has also been increasingly recognized at the international level'. [5]

Even though the ECtHR has not recognized a general right of access to official documents or information, there are several interesting and ground-breaking cases, that show certain conditions, under which Article 10 of the European Convention on Human Rights may point toward a right of access to documents held by public authorities. [6]

First, the case law *Sdružení Jihočeské Matky v. Czech Republic*, application n°19101/03, decision on admissibility of 10 July 2006 suggests that under certain

circumstances Article 10 of the Convention may imply a right of access to documents held by public bodies. [7]

Another conceptual point of view is shown in one of the most important recent cases of ECtHR - *Guseva v. Bulgaria* case law 17 February 2015. [8]

This case shows a considerable hesitation of judges, concerning the approach to the Article 10 regarding access to information.

The Court considered that ‘the applicant must have suffered frustration as a result of the impossibility for her to perform her role of an association representative because of the failure of the administrative authorities to provide her with the information she had sought in implementation of the three final judgments in her favour’ Also in its decision the Court pointed out that, in ‘cases where the applicant was an individual journalist and human rights defender, it has held that the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom (see *Shapovalov v. Ukraine*, no.45835/05, § 68, 31 July 2012; *Dammann v. Switzerland*, no.77551/01, §52, 25 April 2006).’

It is obvious, that transparency is accompanied by human right to information, and the relationship between these ‘companions’ is seen by Jonathan Klaaren ‘...as a vehicle for increasing a certain amount of transparency or (stated somewhat differently) as a vehicle for furthering the ends or some of the ends contained within the concept of transparency’. [9]

Jonathan Klaaren also argues that ‘the development of a norm of informational privacy, where individual may enforce certain rights and norms concerning information about that individual, can be seen as taking away from transparency. [10]

In this sense, *Bărbulescu v. Romania* case law 12 January 2016, concerning the surveillance of Internet usage in the workplace is a ‘good lesson to learn’ about the right to privacy and data protection. [11]

Apparently, that solution of such issues by ECtHR can form a model for numerous states in Europe. As we know, rulings of the ECtHR are binding to countries, which have ratified the European Convention on Human Rights, including Ukraine.

Transparency is the most important principle of public administration of Ukraine. According to the new Law of Ukraine “On Civil Service” transparency is best understood as openness of information about the activities of public servants, except those defined in the Constitution and laws of Ukraine. [12]

At the same time Ukraine has not signed or ratified the Council of Europe Convention on Access to Official Documents.

The Ukrainian Parliament Commissioner for Human Rights Valeria Lutkovskaya states that ‘joining the Council of Europe Convention on Access to Official Documents will support Ukrainian enhancement of legislation in the sphere of access to information, will input the mechanism of international monitoring of right of access to official documents, will develop the overcoming corruption situation by means of extensive informational openness. Signing and ratification of the Convention will show advance Ukraine's loyalty to the principles of freedom of information, access to public information, being a positive impact on international image of Ukraine.’[13]

By way of conclusion, it is worth to point out that ratification of the Convention and its further implementation in Ukraine will become the way of solving problems in modern public administration, through the application of constitutionalist principles in law and governance.

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- Article 10:* ‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
9. *Sdružení Jihočeské Matky v. Czech Republic*, ECHR (2006), application n 19101/03, decision on admissibility of 10 July 2006
 10. *Guseva v. Bulgaria*, ECHR (2015), application no. 6987/07, judgment of 17 February 2015
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